STATE OF MICHIGAN
IN THE SUPREME COURT

JOYCE McDOWELL, a formal Special Personal Representative of the Estate of BLAKE BROWN, deceased, JOYCE BROWN, deceased, CHRISTOPHER BROWN, deceased, NAOMI FISH, deceased, JOHNNY C. FISH, deceased, JERMAINE FISH, deceased, as Special Conservator of JONATHAN FISH, a minor and as Special Conservator of JOANNE CAMPBELL and JUANITA FISH, adults,

Plaintiffs/Appellees/Cross-Appellants

v.

CITY OF DETROIT, individually and acting by and through the DETROIT HOUSING COMMISSION,

Defendants/Appellants/Cross-Appellees

Supreme Court No: 127660

Court of Appeals No: 246294

Wayne County Circuit Court
Case No: 00-039668-NO

BRIEF OF *AMICUS CURIAE* INSURANCE INSTITUTE OF MICHIGAN IN SUPPORT OF APPELLANTS

Respectfully submitted,

WILLINGHAM & COTÉ, P.C.

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STATEMENT OF QUESTIONS PRESENTED

I. Does a lease of a premises generally include both the inner and outer walls of the leased premises?

Plaintiffs/Appellees said:	No
Defendants/Appellants say:	Yes
Circuit Court said:	Did not address this issue.
Court of Appeals said:	Did not address this issue.
Amicus Curiae say:	Yes

II. Is the general rule that a lease of a premises includes both the inner and outer walls of the leased premises modified by the portion of the subject lease that limited the tenant's right to make "alterations or repairs or redecoration to the interior of the Premises or to install additional equipment or major appliances without the written consent of Management"?

Plaintiffs/Appellees said:	Yes
Defendants/Appellants say:	No
Circuit Court said:	Did not address this issue.
Court of Appeals said:	Yes
Amicus Curiae say:	No

STATEMENT OF THE BASIS OF JURISDICTION OF THE SUPREME COURT

Amicus curiae Insurance Institute of Michigan accepts and relies on "Statement of Jurisdictional Basis" submitted by Appellants for purposes of this brief.

STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Insurance Institute of Michigan ("IIM") is a non-profit Michigan corporation formed to serve the Michigan insurance industry and insurance consumers as a source of information and education regarding insurance issues for the media, the government and the public. Its mission includes creating a greater public awareness of the insurance business, the benefits to the Michigan economy of a private, entrepreneurial insurance and risk management industry through educational and public relations programs, safety and loss prevention activities, strong press and media assistance to consumer programs, legislative and lobbying efforts, judicial and legal overview, and other activities that will promote an improved understanding of the purpose and principles of insurance and assist the public in addressing their business and personal needs. It has 45 insurer members[1].

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[1] The members are: Allied Insurance Company, Allstate Insurance Company, American Fellowship Mutual Insurance Company, Auto Club Insurance Group, Badger Mutual Insurance Company, Cincinnati Insurance Companies, DaimlerCrysler Insurance Company, Elevators Mutual Insurance Company, EMC Insurance Companies, Farm Bureau Insurance Group, Farmers Insurance Group, Farmers & Merchants Mutual Fire Insurance Company, Farmers Mutual Fire Insurance Co., First Non-Profit Insurance Company, Foremost Insurance, Frankenmuth Mutual Insurance Company, Fremont Mutual Insurance Company, GEICO Corporation Group, GMAC Insurance Holdings Group, Grange Insurance Company of Michigan, Great Lakes Casualty Insurance Company, Harleysville Lake States Insurance Company, Hastings Mutual Insurance Company, MEEMIC Insurance Company, Michigan Construction Industrial Mutual, Michigan Insurance Company, Michigan Millers Mutual Insurance Company, Mid-State Surety Corporation, Nationwide Insurance Company, North Pointe Insurance Company, Northern Mutual Insurance Company, Ohio Casualty Group, Pioneer State Mutual Insurance Company, Professionals Direct Insurance Company, Progressive Insurance Company, ProAssurance Insurance Company, Secura Insurance, Southern Michigan Insurance

In the order granting leave to appeal, a copy of which is attached as Exhibit A, this Court specifically invited the Insurance Institute of Michigan to file *amicus curiae* briefs. Pursuant to that invitation, IIM is filing its *amicus curiae* brief in support of the Defendants/ Appellant/Cross-Appellees City of Detroit.

Company, Starr Insurance, State Auto Insurance companies, State Farm Insurance, Titan Insurance Company, USAA Group, Westfield Companies and Wolverine Mutual Insurance Company.

STATEMENT OF FACTS

Amicus curiae Insurance Institute of Michigan accepts and relies on Statement of Facts submitted by Appellants for purposes of this brief.

LAW AND ARGUMENT

I. THIS COURT SHOULD REVERSE THE COURT OF APPEALS' RULING AS THE COMMON LAW OF THIS STATE IS THAT A LEASED PREMISES INCLUDES ALL OF THE SPACE OF THE PREMISES, INCLUDING THE OUTER WALL AND THE LEASE PROVISIONS DO NOT ALTER THE COMMON LAW POSITION.

In order to establish the trespass-nuisance exception to governmental immunity, the Appellees must show "condition (nuisance or trespass); cause (physical intrusion); and causation or control (by government)." *Hadfield v Oakland Co Drain Comm'r*, 430 Mich 139, 169; 422 NW2d 205 (1988). IIM agrees with the Appellants that Appellees have not made the requisite showing of an intrusion to support the application of the nuisance-trespass exception to government immunity since the leased premises included the interstitial space between the inner wall and outer wall. Since the Appellees claim that the fire originated in this interstitial space, there was no intrusion as the fire originated in Appellee's leased premises.

A. STANDARD OF REVIEW

MCR 2.116(C)(7) provides in relevant part that a motion for summary disposition may be granted when "the claim is barred because of... immunity granted by law...." This Court reviews a ruling on a motion for summary disposition under MCR 2.116(C)(7) de novo. *Grimes v Michigan Dept of Transportation*, 475 Mich 72, 76; 715 NW2d 275 (2006).

When reviewing a motion for summary disposition under MCR 2.116(C)(7), this Court must consider the affidavits, pleadings, depositions, admissions and documentary evidence filed in the action or submitted by the parties. MCR 2.116(G)(5). However, the affidavits, depositions, admissions and documentary evidence offered shall only be considered to the extent that the content or substance would be admissible as evidence. MCR 2.116(G)(6).

Further, this Court has ruled that the proper interpretation of a contract is a question of law, which this Court reviews de novo. *Archambo v Lawyers Title Ins Corp*, 466 Mich 402, 408; 646 NW2d 170 (2002). Further, when this Court examines the contractual language, this Court must give the contractual language its ordinary and plain meaning if such would be apparent to a reader of the instrument. *Bianchi v Automobile Club of Michigan,* 437 Mich 65, 71 n 1; 467 NW2d 17 (1991).

B. THE LEASE LANGUAGE AND COMMON LAW PROVIDES THAT THE TENANT'S LEASE OF THE PREMISES INCLUDES THE OUTER WALL.

Jo-Ann Campbell entered into a lease with the Detroit Housing Commission[2]. In describing the geographical scope of the leased premises, the lease provides that the "premises" was the building numbered 1215, dwelling unit numbered 1224 and located at the address of 2537 St. Antoine, Detroit, Michigan 48201. Further, the lease provided:

> Resident and Resident's Household shall have the exclusive right to occupy the leased Premises, which shall include reasonable accommodation of Resident's guests or visitors who may not reside with Resident for longer than fifteen (15) days. Management consent, which shall not be unreasonably withheld, shall be required to have a foster care or live-in residing in the unit to assure that the dwelling size is adequate and/or live-in care is appropriate.

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[2] A copy of the lease is attached as Exhibit B.

There is nothing in this language or any other language of the lease that limits the geographical scope of the premises, much less specifically excludes the interstitial space between the inner and outer walls.

The common law of this state is that a lease of a premises extends to and includes the outer wall. In *Forbes v Gorman*, 159 Mich 291; 123 NW 1089 (1909), this Court had to decide the geographic scope of a leased premises. In making its ruling, this Court ruled that "the lease of a building, or of one floor or store thereof, conveys to the lessee the absolute dominion over the premises leased, *including the outer as well as inner walls*. Such lessee obtains the right, in the absence of restrictions, to use such premises, *including the walls*, for all purposes not inconsistent with the lease." *Forbes*, 159 Mich at 294 (emphasis added).

This Court's decision in *Forbes* has not been overruled or modified by any subsequent decision. Further, there is no statute that has specifically excluded the outer walls from being part of a leased premises. In fact, the general principle that the interstitial space between walls is not under the general control of the landlord has been affirmed by a recent unpublished Court of Appeals' decision.

In *Morris v Fredenburg*, unpublished per curiam opinion of the Court of Appeals, No. 186186 (October 25, 1996)[3], the Court of Appeals reaffirmed that the interstitial space between walls was not a common area under the control of a landlord. In *Morris*, the Court of Appeals had to decide, as in this case, if the wiring space between walls and in the

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[3] Although not binding on this Court, this case illustrates that the common law rule that lease premises extends to and include the outer law is still good common law in this state as it remains to be recognized by the appellate courts. Pursuant to MCR 7.215(C)(1), a copy of the opinion is attached as Exhibit C.

ceiling was common space under the control of the landlord. The Court of Appeals ruled that "the trial court appropriately ruled, without regard to the statute, that the wiring space between the walls and above the ceiling was not, as a matter of law, a common area." *Morris*, 3. If the space was not common space under the control of the landlord, by default, it must have been part of the leased premises under the control of the tenant.

The premise that a lease extends and includes the outer walls unless specific provisions of the lease provides otherwise also exists in the common law of other states. In *Riddle v Littlefield*, 53 NH 503 (1873), the New Hampshire's Superior Court of Judicature had to decide whether the outer walls of a building was included within the leased premises. In determining that the outer walls were included, the Court reasoned that both sides are part of a wall, and both are essential to the use of the interior of a building:

> Now, it will hardly be contended that the outside wall of a store or house is not essential for the reasonable and proper enjoyment of the interior of the building. The outer side of the wall is but one side of the same wall that has an inner side; and the removal of the wall removes both sides.
>
> If, then, a lessee or grantee may have the wall which he pays for, it would seem that he should be entitled to the use of it, not only for purposes indispensable to the occupation of the building, but also for any purpose of service or profit not inconsistent with the lawful and reasonable enjoyment of the property.
>
> *Riddle*, 53 NH at 509.

The Nebraska Supreme Court has also supported the position of the New Hampshire Court. In *Bee Building Co v Peters Trust Co*, 106 Neb 294, 297; 183 NW 302 (1921), the Nebraska Supreme Court ruled:

> It is a general rule that a tenant has the right to everything reasonably necessary to the use and enjoyment of the demised premises.

> [I]t is said: "A lease of a part of a building *prima facie* passes the outer wall adjacent to the rooms or apartment named as party of the premises leased, and consequently the lessee has the exclusive right to use such wall for advertising purposes."
>
> (Internal citations removed; emphasis in original)

The Connecticut Supreme Court also agreed. In *Central Coat, Apron & Linen Service, Inc v Indemnity Insurance Co of North America*, 136 Conn 234; 70 A2d 126 (1949), the Court had to decide whether or not the front wall and door of the garage was included within the leased premises. In finding that the front wall and door of the garage were included in the leased premises, the Connecticut Supreme Court ruled:

> Where entire premises are rented, in the absence of any agreement, the tenant, with certain possible exceptions not presented by the facts before us, has the right of exclusive possession and control, and the landlord has no right to enter upon them. In the absence of an agreement, express or implied, the tenant of an apartment acquires an exclusive right of occupancy and control of that apartment and, as incidental thereto, of those parts of the structure which form an integral part of the tenement. Where an owner leases a part or parts of a building, he ordinarily retains control such portions as are not within or an integral part of the rented portions. The most usual instance of such a situation is a common approach to different tenements rented to various people.
> * * *
> [I]n the absence of any provision of a lease to the contrary, the right to use and control the outer walls adjacent to a portion of a building occupied by a tenant is impliedly included in the premises he rents.
>
> *Central Coats, Apron & Linen Service, Inc*, 136 Conn at 237-239 (internal citations removed).

Similarly, the Massachusetts Supreme Judicial Court has concluded that not only does the tenant's premises extend to a traditional outer wall, but it also includes the outer glass pane of a window. In *Leominster Fuel Co v Scanlon*, 243 Mass 126; 137 NE 271 (1922), a dispute arose over who, the landlord or the tenant, had the responsibility to

replace a broken pane of glass after being broken by a third party. In holding that the responsibility belongs to the tenant, the Court ruled:

> Apparently in the case at bar the window was of considerable size, upon the street floor, adjacent to the sidewalk. It is essential in order to light the room leased. Its exterior surface was as indispensable to to [sic] this end as its interior surface or its transparent substance. It would have been incompatible with the purposes of the lease and the valuable use of the room by the tenant for the landlord to have any right of control over the exterior of the window. The cleaning of both its outside and inside (in the absence of express agreement) would naturally be under the control of the tenant. It is manifest that the tenant of a room possesses the incidental right to use and decorate the interior walls, floor and ceiling in accordance with his own taste and needs so long as he does no harm to them. His lease covers not merely the cubical space bounded by the inner planes of walls, floor and ceiling. Such a tenancy implies the right to attach carpets or rugs to the floor. In former days it included the right to set up a stove and connect with the chimney, thus involving a certain use of the wall. Ordinarily pictures may be hung. Painting and papering are within the natural uses by the tenant of a room. One of the uses of a tenant of a room for business naturally might be the display of his name and occupation on his window. These factors lead to the conclusion that, prima facie and in the absence of agreement, the lease in the case at bar included the whole of the plate glass window.
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> *Leominster Fuel Co*, 243 Mass at 272.

As the opinions in *Riddle, Bees Building Co*, *Central Coat, Apron & Linen Service, Inc,* and *Leominster Fuel Co* point out, the outer wall is an essential part of the leased premises as it is needed for the reasonable and proper enjoyment of the interior portion of the leased premises. This common sense principle is further supported by an award of monetary damages for a tenant when a landlord removes an outer wall. For example, in *Frepons v Grostein*, 12 Idaho 671; 87 P 1004 (1906), the landlord removed the outer walls because the landlord was building another building adjacent to the leased hotel. Although the outer walls were eventually replaced, the tenant claimed that the removal of the outer walls violated the tenant's leasehold interest as the outer walls were part of the leasehold

interest. In affirming the trial court's money judgment for the tenant, the Idaho Supreme Court ruled that the landlord's removal the outer walls of the hotel rented by the tenant violated the lease as the "landlord cannot, after he has rented rooms in a building for a certain purpose, so tear down and destroy or mutilate the building as to render such rooms unsuitable for the purposes for which they were leased without being liable for damages." *Frepons*, 12 Idaho at 677. By removing of the outer walls of the leased premises, the landlord damaged the leased premises and the tenant did not have to pay rent for the premises. *Frepons*, 12 Idaho at 677-678.

As this Court's decision in *Forbes* and the decisions from the other states[4] clearly demonstrate, it is well-established common law that, except when there is a lease provision specifically providing otherwise, the leased premises includes the outer walls. In reviewing the lease in this case, there is absolutely no language that specifically excludes the outer walls from the geographical scope of the leased premises. Given the lack of such a clause in the instant case, the outer walls are included. Therefore, since the Appellees argue that the fire started in the interstitial space between the inner and outer wall and given the lack

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[4] Courts, other than those previous cited, have also supported the general proposition that, without a contractual provision otherwise, a lease includes the outer walls. See generally *Smith v Jensen*, 156 Ga 814, 818; 120 SE 417 (1923); *400 North Rush Inc v D J Bielzoff Products Co*, 347 Ill App 123, 127-128; 106 NE2d 208 (1952); *Starr v Sperry*, 184 Iowa 540, 547; 167 NW 531 (1918); *Hilburn v Huntsman*, 187 Ky 701, 702; 220 SW 528 (1920); *265 Tremont Street, Inc v Hamilburg*, 321 Mass 353, 359; 73 NE2d 828 (1947); *Lowell v Strahan*, 154 Mass 1, 7-11; 12 NE 401 (1887); *Kretzer Realty Co v Thomas Cusack Co*, 196 Mo App 596, 604-608; 190 SW 1011 (1916); *Lent & Graff Co v Satenstein*, 210 AD 251, 252; 205 NYS 403 (1924); *Platou v* Swanton, 59 ND 466, 471; 230 NW 725 (1930); *Goodyear Rubber Co v Goodrich Rubber Co*, 30 Ohio Dec 529, 532; 12 Ohio NP 433 (1911); and *Salinger v North American Woolen Mills Co*, 70 W Va 151, 155; 73 SE 312 (1911).

of the lease provision excluding the outer wall from the lease, the fire originated in the Appellees' residence and, thus there cannot be, as a matter of law, a physical intrusion by the Appellants. Thus, the trespass-nuisance exception does not apply and Defendant has governmental immunity.

C. THE LEASE LANGUAGE REQUIRING THE TENANT TO OBTAIN CONSENT TO ALTER OR REPAIR THE LEASED PREMISES DOES NOT REVERT CONTROL OF THE INTERSTITIAL SPACE BETWEEN THE INNER AND OUTER WALL BACK TO THE LANDLORD.

In an erroneous attempt to circumvent the common law, Appellees, relying on an unsupported conclusion of the Court of Appeals, attempt to argue that the lease's provision that the tenant must obtain the landlord's consent to make any alterations or repairs transferred the control of the interstitial space from the tenant to the landlord. However, there is no sound legal support for this proposition, and to the contrary, cases in Michigan and other states hold that approval of alterations and repairs does not equate to control of premises by a landlord.

In affirming the trial court's denial of Appellants' motion for summary disposition, the Court of Appeals made the following finding:

> In making determinations relative to "cause" or "physical intrusion" in this case, we must engage in a discussion of the interstitial space between the walls of the premises. We have studied the written lease and we conclude that the interstitial space between the outer walls of the premises is under the sole control of the lessor. The language of the lease specifically provides that the lessee resident agrees to "make no alterations or repairs or redecoration to the interior of the Premises or to install additional equipment or major appliances without the written consent of Management." Section VII.B.1.G. The plain language of the contract indicates that the lessee had only very limited control over even the interior of the premises, let alone control over the interstitial space between the walls. Accordingly, under our plain reading of the lease agreement, the interstitial space is totally within the

> control of the lessor and not subject to intervention by the lessee as a matter of law.
>
> *McDowell v City of Detroit*, 264 Mich App 337, 353-354; 690 NW2d 513 (2004).

However, this finding by the Court of Appeals, which lacks any citation to supporting legal authority, is contrary to established case law holding that the retention by the landlord of the right to approve alterations or repairs does not put the landlord in "control" of the leased premises.

It is important to note that the lease provision cited by the Court of Appeals is not found in the sections of the lease describing the geographic location of or the right to occupy the leased premises. Rather, it is found in an ancillary section entitled "Obligations and Rights of Parties." The provision requiring a tenant to obtain the consent of the landlord prior to completing any alterations or repairs is found in the same section that bars the tenant from having boarders or lodgers, from operating a commercial enterprise from the leased premises, from having the leased premises unclean and unsafe, from disposing refuse, garbage, rubbish, and other waste in an unsanitary and unsafe manner, from destroying, defacing, damaging, or removing any part of the leased premises, from keeping unapproved pets, from disturbing the tenant's neighbors, and from engaging in criminal activity including illegal drug use. It is an undue stretch and distortion of legal logic to find that these lease conditions preventing a tenant from engaging in illegal, destructive, or unsafe activities prevent the tenant from having control over the leased premises. These obligations do not shift the control of the leased premises but rather "merely define the manner of the use or control." See *Starr v Sperry*, 184 Iowa 540, 548; 167 NW 531 (1918).

This Court has previously established that retention by a landlord of control of repairs to leased premises does not establish that the landlord has control over the leased premises. In *Bluemer v Saginaw Central Oil & Gas Service, Inc*, 356 Mich 399; 97 NW2d 90 (1959), this Court had to determine if the landlord's retention of the duty to repair the leased premises put the landlord in control of the lease premises for purposes of holding the landlord liable under premises liability. In ruling that the landlord did not retain control, this Court pointed out, "it will be noted that the agreement did not reserve to the landlord the right to control of either the premises or the business. The obligation assumed by it to maintain and keep in repair the building and equipment leased to [the tenant] may not be construed as a reservation of such right of control." *Bluemer*, 356 Mich at 405-406. (Emphasis added).

Likewise in this case, the Appellant did not retain control over the premises in the lease agreement. In fact, the Appellants transferred the exclusive right to occupy the leased premises to the tenant. See Detroit Housing Commission Dwelling Lease, V. Occupancy of Dwelling Unit. The fact that the landlord retained the obligation to repair the leased premises in the same section of the lease as the landlord retained the authority to consent to any alterations or repairs by the tenant does not revoke the general assignment of the control of the leased premises to the tenant. Rather, retaining the right to consent to the tenant completing repairs and alterations only enforces the obligation of the landlord to maintain the premises as it ensures that the tenant does not usurp the landlord's retained obligation, which according to *Bluemer* does not place control of the leased premises in the hands of the landlord.

The position of this Court that the landlord retains no control of premises when the landlord merely reserves the right to approve any alterations or repairs by the tenant is also supported by the case law of other states. For example, in *Wyatt v Hinton Enterprises, Inc*, 899 SW2d 547 (Mo App, 1995), the Missouri Court of Appeals decided whether a landlord could be held liable for a death of a customer who was struck by a vehicle in a parking lot. This ultimate issue was controlled by whether the landlord, Goodyear, retained control over the leased premises. In ruling that Goodyear did not retain control, the Missouri Court of Appeals ruled that a provision similar to that at bar did not constitute control:

> Plaintiffs contend Goodyear maintained sufficient control over the design and layout of the Dobbs facility that it should be liable for those defects. The sublease provides:
>
> > Sublessee will make no alterations or additions in or to the premises without the prior written consent of Sublessor except as provided in Paragraph 5 above [relating to interior fixtures].
>
> Plaintiffs suggest this "veto power" over alterations is sufficient control to warrant a finding of liability. We disagree.
>
> The trial court found, and we agree, that as to this issue, this case is indistinguishable from Horstman v Glatt, 436 SW2d 639 (Mo 1969). In Horstman, plaintiff was injured when the marquee which covered the entrance to a hotel fell while he was standing on it. Id. at 640. At the time of the injury, the hotel was owned by the defendant and leased to another party. Id. at 641. Plaintiff sued defendant owner on the theory that defendant retained control over the premises and as such had a duty to exercise ordinary care to maintain the marquee in a reasonably safe condition. Id. at 643. The supreme court held defendants had no duty to plaintiff on the theory of reservation of control by the defendants over the leased property in spite of numerous restrictions in the lease which included a provision prohibiting tenants from making any alterations to the property without the written consent of the landlords.
>
> *Wyatt*, 899 SW2d at 550. (Emphasis added).

This principle that approval of alterations and repairs is not control of premises was also very recently affirmed by the Massachusetts Supreme Judicial Court in *Humphrey v Byron*, ___ Mass ___; ___ NE2d ___ (July 21, 2006)[5]. In *Humphrey*, the Massachusetts court addressed whether the landlord's retention of the right to approve repairs or alterations resulted in the landlord retaining control of the leased premises. In finding that the landlord did not retain control, the Court ruled:

> The lease does provide that Gateway must obtain the landlord's approval before making any repairs or alterations. The lease also contains a provision permitting the landlord to "make repairs and alterations compatible with Lessee's use of premises if they should elect so to do." However, a landlord's reservation of "various rights to make alterations and repairs and to approve [the tenant's] alterations and repairs," and specifically a requirement in a lease "that the landlord give its prior written consent to construction that the tenant proposes to undertake," does not render the landlord liable to the injured plaintiff for an injury occurring on the leased premises. As the Appeals Court commented, "That sort of clause is thought to enable a landlord to protect the structural integrity of its building." These provisions do not "alter the basic allocation of responsibilities that the parties have worked out in their detailed lease, namely, that the tenant is in control of and responsible for its leased space and that the landlord is not."
>
> *Humphrey*, 17-18 (internal footnotes and citations removed).

The *Humphrey* opinion is logically indistinguishable from this case. In *Humphrey*, as in this case, the landlord retained both the right to do alterations and repairs and the right to approve the tenant's alterations and repairs. As ruled in *Humphrey*, these provisions do not shift the control of the leased premises from the tenant to the landlord but rather protect the structural integrity of the building. The holding in *Humphrey* is wholly consistent with this Court's ruling in *Bluemer*, and therefore, additionally supports Appellants' position.

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[5] For the convenience of this Court, a copy of the opinion is attached as Exhibit D.

Further support for the position that the lease provision did not shift control is found in a New Jersey Court ruling that a landlord's retention of the right to approve a tenant's alterations or repairs cannot be used by the tenant to escape liability for lack of control over the leased premises. In *Knox v Goodman*, 45 NJ Super 428; 133 A2d 50 (1957), the tenant attempted to shift the premises liability from himself to the landlord, claiming that the landlord retained control over the premises since the landlord retained the authority to approve the tenant's alterations and repairs. The court rejected that argument and ruled that the provision did not shift the burden from the tenant to the landlord. *Knox*, 45 NJ Super at 436-437.

As detailed in *Bleumer* and supported in the *Wyatt, Humphrey*, and *Knox* opinions, the landlord's retention of the right to approve any tenant's alterations or repairs of the leased premises does not result in the landlord retaining control of the premises. Rather, the retention of the right only serves to protect the structural integrity of the building, which the landlord has a reversionary interest in. This retention of the right to approve the tenant's alterations and repairs is harmonious with the Michigan precedent holding that retention by the landlord of repair obligations for the leased premises, does not shift the ultimate control of the tenant's leased premises to the landlord. Please see *Bluemer*, 356 Mich at 405-406.

In order to establish the trespass-nuisance exception to governmental immunity, the Appellees must show "condition (nuisance or trespass); cause (physical intrusion); and causation or control (by government)." *Hadfield v Oakland Co Drain Comm'r*, 430 Mich 139, 169; 422 NW2d 205 (1988). Since the tenant had control of the leased premises including the interstitial space between the inner and outer wall and that control was not

shifted to the landlord by lease provisions merely granting the landlord the right to approve the tenant's alterations and repairs, the Appellees can not establish that Appellants had control of the interstitial space between the inner and outer wall, or that there has been a physical intrusion by the landlord requisite to a physical intrusion.

CONCLUSION AND REQUEST FOR RELIEF

In this case, Appellees have not made the requisite showing of an intrusion to support the application of the nuisance-trespass exception to government immunity since the leased premises, under the terms of the lease and established common law, included the interstitial space between the inner wall and outer wall. Further, under the established common law, the lease provision in which the landlord retained the authority to consent to the tenant's alterations or repairs of the leased premises did not shift the control of the leased premises from the tenant to the landlord. Therefore, since the Appellees claim that the fire originated in this interstitial space, and there was no intrusion by Appellants since the fire originated in Appellee's leased premises, the claim against Appellants is invalid as a matter of law.

This Court should reverse the Court of Appeals' decision and grant summary disposition to the Appellants since Appellees' claims are barred by governmental immunity.

Respectfully submitted,

WILLINGHAM & COTÉ, P.C.

Dated: July 26, 2006

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